STATE OF MICHIGAN

IN THE SUPREME COURT

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DAVID SANCHEZ,
Plaintiff-Appellant,
Cross Appellee

vs.

EAGLE ALLOY, INC., and SECOND INJURY FUND,
Defendant-Appellees,
Cross Appellants.

SC:123114
COA: 238003
WCAC: 00-000248

ALEJANDRO VAZQUEZ,
Plaintiff-Appellant,
Cross Appellee

v.

EAGLE ALLOY, INC.,
Defendant-Appellee,
Cross Appellants.

SC:123115
COA: 239592
WCAC: 01-000182

Amicus Curiae Brief, on behalf of the Michigan Migrant Legal Assistance Project, Inc., the National Employment Law Project, West View Orchards & Cider Mill of Romeo, and Zylstra Greenhouse.
Oral Argument Requested.

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***AMICUS CURIAE* BRIEF, ON BEHALF OF THE MICHIGAN MIGRANT LEGAL ASSISTANCE PROJECT, INC., THE NATIONAL EMPLOYMENT LAW PROJECT, WESTVIEW ORCHARDS & CIDER MILL OF ROMEO, AND ZYLSTRA GREENHOUSE.**

ORAL ARGUMENT REQUESTED

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III. STATEMENTS OF INTEREST

A. The Michigan Migrant Legal Assistance Project, Inc.

The Michigan Migrant Legal Assistance Project, Inc. (MMLAP) has worked for over 30 years to protect the employment rights of our 120,000 migrant and seasonal agricultural workers, and former farmworkers who settle into mainstream jobs. Although their average family income per year is under $10,000, farmworkers harvest 45 crops in Michigan with a market value of 10 billion dollars.[1] MMLAP has helped thousands of workers receive their minimum wage and maintain their income. MMLAP attorneys have extensive experience defending the rights of the most vulnerable and exploited families –those with members who have questionable immigration status.[2] Through education, community advocacy, litigation and class actions, MMLAP has helped farmworker families maintain the basics in life. The vast majority of MMLAP's target population is in jeopardy of being denied an essential element of their survival: wage loss benefits under Michigan's worker compensation system. Currently, certain worker compensation insurance companies are summarily denying benefits based solely on the *presumption* that the worker is undocumented. *Even when that presumption is wrong.* MMLAP currently represents workers who were summarily denied benefits based solely on the insurer's *presumption* of undocumented status.

B. The National Employment Law Project

The National Employment Law Project (NELP) has worked for over 30 years to advance the workplace rights of low-wage workers, including immigrant workers. Both directly and through its network with local community groups, labor unions and legal services organizations, NELP has represented thousands of immigrant workers attempting to enforce their labor rights. NELP attorneys have written, lectured, litigated, and engaged in policy advocacy on behalf of low-wage immigrant workers throughout the United States. Recently, NELP has substantially assisted in preparing an amicus brief on the issue of undocumented workers' eligibility for workers' compensation benefits in Maryland and submitted an amicus brief to the Masachusetts Board of Industrial Accidents which subsequently concluded that undocumented workers continue to be eligible for workers' compensation benefits following the Supreme Court's decision in Hoffman Plastic Compounds v. NLRB.

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[1]Value of crops from field to consumer, 2000-2001 Michigan Agricultural Statistics, MSD/MFIA November 2001

[2]52% of farmworkers are undocumented, Findings from the National Agricultural Workers Survey 1997-1998: A Demographic Profile of United States Farmworkers. (March 2000). 85% of immigrant families have undocumented members, according to the National Immigration Law Center studies.

C. **Westview Orchards & Cider Mill of Romeo, Michigan and Zylstra Greenhouses of Kalamazoo, Michigan**

Westview Orchards and Zylstra Greenhouse are both large agricultural employers based in the state of Michigan. As agricultural employers, their workforce consists of a large number of immigrants for which they pay workers' compensation premiums. Although neither employer knowingly hires any undocumented workers, they do not want to be exposed to general tort liability if they accidently hire one. They want to ensure that they receive the full benefits of their participation in Michigan's Workers' Compensation system; both the freedom from general liability that the exclusive remedy provision provides, and coverage for their employees who suffer wage and medical expenses from a work-related injury. Westview Orchards currently has a worker in need of worker compensation benefits, but wage loss was denied based on the insurer's suspicion the worker was undocumented.

IV. STATEMENT OF QUESTIONS PRESENTED

A. IN LIGHT OF ALL THE FACTS IN THIS CASE, INCLUDING THE WORK ACTUALLY PERFORMED BY THE PLAINTIFFS AND THEIR STATUS AS UNDOCUMENTED ALIENS, WERE THEY "UNDER ANY CONTRACT OF HIRE, EXPRESS OR IMPLIED" WITHIN THE MEANING OF MCL 418.161(1)(l)?

Plaintiff-Appellant answers "yes."
Defendant-Appellee answers "no."
Amicus Curiae answers "yes."

B. DOES THE MEANING OF THE WORD "ALIEN" IN THE FIRST CLAUSE OF MCL 418.161(1)(l) INCLUDE UNDOCUMENTED ALIENS?

Plaintiff-Appellant answers "yes."
Defendant-Appellee answers "no."
Amicus Curiae answers "yes."

C. WERE THE PLAINTIFFS "UNABLE TO OBTAIN OR PERFORM WORK BECAUSE OF...COMMISSION OF A CRIME" WITHIN THE MEANING OF THE FINAL SENTENCE OF MCL 418.361(1)?

Plaintiff-Appellant answers "no."
Defendant-Appellee answers "yes."
Amicus Curiae answers "no."

D. DID THE COURT OF APPEALS CORRECTLY DETERMINE THAT THE PLAINTIFFS SHOULD RECEIVE WORKER'S COMPENSATION BENEFITS UNTIL THE DATE WHEN THE DEFENDANT DISCOVERED THEIR STATUS AS UNDOCUMENTED ALIENS?

Plaintiff-Appellant answers "no."
Defendant-Appellee answers "no."
Amicus Curiae answers "no."

V. STATEMENT OF FACTS

Amicus Curiae adopts the Procedural History, Statement of Facts, and Summary of Medical Evidence of the Plaintiff-Appellants for its Statement of Facts, herein.

Furthermore, according to the Immigration and Naturalization Service (INS), as of October 1996, there are an estimated five (5) million illegal immigrants in the United States–thirty-seven thousand (37,000) of them in Michigan. Estimated Illegal Immigrant Population for Top Twenty Countries of Origin and Top Twenty State of Residence: October 1996, Table 1, Immigration and Naturalization Service, updated December 2001. This number is growing at a rate of approximately 275,000 per year. Immigration Fact Sheet, Average Annual Growth 1992-1996, INS Statistics Division (11/14/01).

However, the mere fact that a person is here illegally does not mean that he gives up all of his legal, civil, and social rights. He is protected by our laws, and he is bound by them, just as are all other people who reside in our country.

Michigan is currently the only state that denies the full benefits of its workers' compensation system to undocumented workers without the express exclusion of undocumented workers from entitlement to those benefits.

There are many more classes of immigrants under the federal immigration law than simply legal or illegal, making it difficult for anyone other than the INS (now BICE) to determine correctly an immigrants status under the law.

VI. STANDARD OF REVIEW

The Workers' Compensation Act provides for judicial review of orders and findings of the Commission.

> The findings of fact made by the commission acting within its power, in the absence of fraud, shall be conclusive. The court of appeals and the supreme court shall have the power to review question of law involved with any final order of the commission, if application is made by the aggrieved party within 30 days after the order by any method permissible under the Michigan court rules.

MCL 418.861a(14). This standard was recently addressed by the Michigan Supreme Court in Mudel v Great Atlantic & Pacific Tea Co, 462 Mich 691 (2001).

> [T]he courts must review the WCAC's decision under the "any evidence" standard. Review by the Court of Appeals and this Court begins with the WCAC's decision, not the magistrate's. If there is any evidence supporting the WCAC's factual findings, and if the WCAC did not misapprehend its administrative appellate role in reviewing decisions of the magistrate, then the courts must treat the WCAC's factual findings as conclusive.

Id., at 709-710. In reaching this conclusion, the Supreme Court reaffirmed its decision in Holden v Ford Motor Co, 439 Mich 257 (1992), and expressly overruled Layman v Newkirk Electric Assoc, 458 Mich 494 (1998) and Goff v Bilmar Foods, 454 Mich 507 (1997), after remand.

VII. ARGUMENTS

A. THE PLAINTIFFS WERE "UNDER CONTRACT OF HIRE, EXPRESS OR IMPLIED" WITHIN THE MEANING OF MCL 418.161(1)(l).

1. THE FACT THAT THE PLAINTIFF-APPELLANTS ARE UNDOCUMENTED AND THAT THEY MISREPRESENTED THEIR IMMIGRATION STATUS TO OBTAIN EMPLOYMENT WITH DEFENDANT-APPELLEE, HAS NO BEARING ON WHETHER THEY WERE UNDER A CONTRACT OF HIRE UNDER MCL 418.161(1)(l).

The established rule in labor law is that employees are eligible for workers' compensation benefits unless the work they performed is illegal. 1C Larson's Workers' Compensation Law § 47.51. In the case at bar, there is no question as to the legality of the work performed by Plaintiff-Appellants for Defendant-Appellee. Questions of illegality in this case center around the Plaintiff-Appellants' immigration status, which is completely unrelated to the legality of their actual labor."Illegality", for purposes of contract-validity and workers' compensation coverage, refers specifically to the subject matter of employment, such as employment in an illegal activity like prostitution. Sanchez v. Eagle Alloy, Inc., 254 Mich.App. 651at 666 (2003).

The Plaintiff-Appellants' undocumented status under immigration law has no bearing on their capacity to form a binding contract of employment under the common law or workers' compensation law. In any event, the WDCA does not specify that the "contract of hire" must be a legal contract. Br. of App. at 17, Sanchez, 2003 WL 57544 at *___. Nothing in the language of 161(1)(l) infers that a "contract of hire" must be a contract between legal U.S. residents. Nothing in the WDCA excludes aliens of any type from receiving full compensation benefits. The WDCA does not specify any category of immigration visas, or

lack thereof, that were intended to be excluded.[3] Nor does it require proof of any immigration status as a prerequisite to recovering benefits.

2. A "CONTRACT OF HIRE" IS ALSO FORMED UNDER STATE AND FEDERAL EMPLOYMENT LAW.

Since the purpose of the WDCA is to compensate a person for work related injuries, it is helpful to look at other statutes that govern the employer/employee relationship and define when a contract of hire exists. Under the Michigan Minimum Wage Law(MMWL), an employment relationship exists when an employer[4] engages, suffers or permits an employee[5] to work. MCL 408.382(d). This is a statutory codification of an implied employment contract, where an employer suffers or permits another to work for him. A "contract of hire" is therefore formed, making the WDCA applicable to any employer and employee subject to the MMWL.

Similarly, federal employment law also creates implied employment contracts through the Federal Fair Labor Standards Act[6] (FLSA) and the Migrant and Seasonal

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[3] There are hundreds of visa categories for immigrants. For at least 42 of these categories, the former INS (now BICE), does not issue any identification card or work authorization card. Exhibit 1.

[4] The act defines "employer" as "a person, firm, or corporation. . . who employs 2 or more employees at any 1 time within a calendar year." MCL 408.382(c).

[5] "Employee" is defined as "an individual not less than 16 years of age employed by an employer on the premises of the employer or at a fixed site designated by the employer. . . ." MCL 308.382(b).

[6] 29 U.S.C §201 et seq.

Agricultural Worker's Protection Act (MSAWPA).[7] Under the FLSA, an employer[8] is required to pay a minimum wage to any person[9] whom he "suffer[s] or permit[s] to work." 29 U.S.C. §203(g). The employment contract, or "contract of hire", is therefore created whenever a person allows another to suffer or permits another to work in his interests or in the interests of an employer.

The MSAWPA also creates a similar contractual obligation known as the *working arrangement* that governs the employment relationship. 29 U.S.C. §1822(c). The working arrangement covers the terms and conditions of the employment between an agricultural employer and a migrant or seasonal agricultural worker and even includes the maintenance of workers compensation insurance. 29 U.S.C. §1841(c), Charite v Jones, 1990 WL 165247, 116 Lab. Cas. P 35, 384 (S.D. Fla 1990). Under the MSAWPA, an employment relationship is formed, and thus a "contract of hire" arises, when an agricultural employer "either recruits, solicits, hires, employs, furnishes, or transports migrant or seasonal workers." 29 U.S.C. §1802(2). The term "employ" under the MSAWPA incorporates the definition utilized in the Fair Labor Standards Act and thus brings it also within the realm of the "contract of hire" definition.

3. MICHIGAN COURTS HAVE DEFINED THE PHRASE "CONTRACT OF HIRE" TO MEAN BARGAINED FOR EXCHANGES OF PROMISES BETWEEN EMPLOYEE AND EMPLOYER.

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[7] 29 U.S.C. §1801 et seq.

[8] The term "employer" "includes any person acting directly or indirectly in the interest of an employer in relation to an employee. . . ." 29 U.S.C. §203(d).

[9] "Person means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons."

As noted by the Court in Sanchez, the meaning of the phrase "contract of hire" was first brought to light in Higgins v. Monroe Evening News, 404 Mich. 1 (1978). In Higgins, this Court held that in order to determine that there was a "contract of hire", it must be shown that both parties to the contract "intended to suffer a detriment to receive a benefit, and that they agreed to exchange those detriments and benefits." Id., at 21. In other words, there must have been a "bargained for exchange" of promises between both parties. Id., at 20. The court later acknowledged that the legislature intended to limit the eligibility for coverage under the act to those "whose regular income source has been cut off." Hoste v. Shanty Creek Mgt., Inc., 459 Mich. 561, 575 (1999) Realizing that under Higgins the definition was broad enough to apply to "virtually everyone, no matter how minimal the exchange of benefits and detriments. . .", this Court later limited the definition to a contract "where the benefit received by the individual is **payment intended as wages**." Id. at 575 (emphasis added). This court reasoned that workers' compensation benefits were intended to supplement for lost income and not for the loss of any gratuitous accommodation that one party may have received in exchange for the performance of a duty. Id. In this case, plaintiffs' payments were intended as wages and each received pay stubs and a W-2. Exhibit 2.

Furthermore, when a person comes into the scope of the act and is injured during the performance of his duty under the contract, his rights are strictly limited to the remedies available under the act. Id. at 576. Therefore, to come within the purview of a "contract of hire", the consideration exchanged for the performance of a duty must be substantial enough "to induce a reasonable person to give up the valuable right of a possible claim against the employer. . . ." Id.

In this case, both Plaintiff-Appelllants were full time employees of the defendant engaged in "gainful employment" and received wages in exchange for work performed. Id.

at 575 (quoting Betts v. Ann Arbor Public Schools, 403 Mich. 507, 518 (1978). They were not in a "social relationship", as was the case in Higgins, and the bargained for exchange was regular income in the form of wages, not a gratuitous promise. Id. at 21. The Plaintiff-Appelllants were willing to accept and perform their duties under the terms of their employment contract because they would be receiving a steady source of income on which to support themselves and their families. They were not gratuitous workers because they were performing services in exchange for a regular source of income, more than a nominal value, and not merely to assist the defendant in furthering its interests. Hoste supra at 578.

Therefore, the Plaintiff-Appelllants were "under contract of hire" within the meaning of MCL 418.161(1)(l) and their undocumented status did not prevent either party from fulfilling the obligations or reaping the benefits of the contract.

B. THE MEANING OF THE WORD "ALIEN" IN THE FIRST CLAUSE OF MCL 418.161(1)(l) INCLUDES UNDOCUMENTED ALIENS.

1. THE LANGUAGE OF THE WDCA SPECIFICALLY INCLUDES "ALIENS" AND DOES NOT DIFFERENTIATE BETWEEN THE VARIOUS CLASSES OF IMMIGRANTS WHO ARE EITHER DOCUMENTED, UNDOCUMENTED, OR UNDER-DOCUMENTED.

Section 161(1)(l) of the WDCA defines an employee as "[e]very person in the service of another, under any contract of hire, express or implied, **including aliens** . . . ." MCL 418.161(1)(l), emphasis added. According to Defendant-Appellee, the legislature could only mean legal aliens because federal law prohibits an employer from hiring undocumented aliens. See, 8 USC 1324(a). However, there is no basis for interpreting the statute in this manner.

The rules of statutory construction are long-standing in Michigan:

> There seems to be no lack of harmony in the rules governing the interpretation of statutes. All are agreed that the primary one is to ascertain and give effect to the intention of the legislature. All others serve but as guides

> to assist the courts in determining such intent with a greater degree of certainty. **If the language employed in a statute is plain, certain and unambiguous, a bare reading suffices and no interpretation is necessary.** The rule is no less elementary that effect must be given, if possible, to every word, sentence and section. To that end, the entire act must be read, and the interpretation to be given to a particular word in one section arrived at after due consideration of every other section so as to produce, if possible, a harmonious and consistent enactment as whole.

Grand Rapids v Crocker, 219 Mich 178, 182 (1922), emphasis added; Dussia v Monroe Co Employees Retirement System, 386 Mich 244, 248 (1971); Williams v Lang, 415 Mich 179, 189 (1979); Weems v Chrysler Corp, 448 Mich 679, 704-705 (1995), dissent.

a. ALIEN DEFINED

The Act specifically includes "aliens" in its definition of employees eligible for compensation; it makes no distinction between legal or illegal. The Act contains no exclusion from eligibility for compensation benefits for undocumented aliens. Where the act wanted to exclude aliens, it did so by excluding foreign exchange students and teachers, leaving all other classes of aliens untouched. See, MCL 418.161(1)(b).

Furthermore, the intent of the legislature is to be given effect without reading more or less into the statute as was intended. Sanchez, supra at 515. Since the legislature did not provide a definition for the term "alien", a dictionary definition of the term can be utilized to ascertain its meaning. Id. at 515 -516 (citing Koontz v. Ameritech Services, Inc., 466 Mich. 304, 312 (2002); Lumley v. Univ. of Michigan Bd. of Regents, 215 Mich.App. 125, 130, (1996)).

Black's Law Dictionary (7th ed) defines the term "alien" to mean:

> A person who resides within the borders of a country but is not a citizen or subject of that country; a person not owing allegiance to a particular nation. * In the United States, an alien is a person who was born outside the jurisdiction of the United States, who is subject to some foreign government, and who has not been naturalized under U.S. law.

Webster's II New Revised Edition, defines "alien" as "[a]n unnaturalized resident of a country."

Given its plain meaning the term "alien" is more inclusive and broader in application than the Defendant-Appellee suggests. It includes any person who is not a citizen or subject (legal resident) of a country. The fact that a person may or may not be residing in the country with permission to do so, is irrelevant.

A similar argument was made in Patel v Quality Inn South, 846 F.2d 700 (N Dist Ala 1988). In that case, the Court emphatically restated the principal that coverage under employee benefit statutes should not be exempted without a clear and specific exemption listed in the statute.

> Given the unequivocal language of the [Fair Labor Standards Act] and its legislative history, it is not surprising that the Supreme Court has adopted an expansive definition of the term "employee" in its decisions under the act. Although it has never faced the question of whether undocumented aliens are covered by the FLSA, the Court consistently has refused to exempt from coverage employees not within a specific exemption.

Id., at 702. **Where an act specifically lists exemptions from coverage, there is a stronger implication that employees not so exempted remain within the act.** Id., at 702, 703, emphasis added, citing Powell v United States Cartridge Co, 339 US 487, 516-517 (1950), (FLSA), and Sure-Tan Inc v NLRB, 467 US 883, 891-892 (1984), (National Labor Relations Act (NLRA)).

In addition, although federal law prohibits the hiring of undocumented aliens, it does not abrogate the rights of undocumented aliens to benefits related to any work actually obtained.

> The conceptual basis of the workers' compensation system is the substitution of the statutory remedy for a common-law right of action, the statutory remedy becoming an integral component of the contract of employment. . . . Its crux, rather, is the compensation of a worker who is already injured on the

> job both for the time lost from work because of the injury and the for the disabling effect of the injury on the future earning capacity.

Mendoza v Monmouth Recycling Corp, 288 NJ Super 240 (1996), cites omitted. In fact, undocumented aliens have rights of access to our courts and are eligible to sue for damages and the redress of other civil wrongs. Id.

> Undocumented workers are entitled to backpay for violations of the Fair Labor Standards Act. Undocumented workers have recovered unpaid wages in state action for breach of an employment contract. **Wage loss by undocumented workers due to on-the-job injuries is compensable.** Undocumented workers are entitled to lost wages as part of a tort recovery, and to damages generally for personal injuries; for wrongful death; and for breach of a sale contract. [I]llegal aliens held as witnesses for trial [are] entitled to full per diem expenses[.] [I]llegal aliens [are] entitled to a broad range of constitutional protections[.] [C]ivil rights' laws protect illegal aliens[.] [I]llegal alien[s are] entitled to compensation under state crime victims' statute[.] [I]llegal alien[s are] entitled to state health benefits[.] [U]ndocumented worker[s are] entitled to state disability benefits.

Local 512, Warehouse and Office Workers Union v NLRB (Felbro), 795 F.2d 705, 718 (1986), n12, emphasis added, citations omitted. "Workers' compensation is as much an incident of the employment as the right to receive salary, and has been earned once the labor has been performed." Mendoza, supra.

b. THE ACT DID NOT INTEND NON-IMMIGRATION ALJ'S TO FIND THEIR WAY THROUGH THE STATUTORY THICKET OF FEDERAL IMMIGRATION LAW.

Defendant-Appellee argues that the issue of immigration is under the sole province of Congress. This fact is true, and it is for this very reason that the Act should not and does not provide for exemptions of "illegal" aliens. Federal cases have addressed this very issue in cases with facts similar to those here.

> General Counsel points out in her brief [that] neither in Felbro[10] nor in any other case has the Board decided what sort of evidence must be adduced to prove lawful entitlement to be present and employed in the United States, or which party bears the burden of producing that evidence. The General Counsel further submits, with the support of the Charging Party, that in view of the complexity of the immigration laws, **only a final determination by the INS that Paredez and Bravo are not entitled to be present and employed in this country should suffice to extinguish their right to backpay and reinstatement in the present case.** She further contends that the Respondent, the party seeking to avoid the Board's traditional remedies, should bear that burden. I find merit in these contentions.
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> **Neither an NLRB administrative law judge nor a Regional compliance officer possesses the expertise or experience to find her way through this statutory thicket and determine independently the status of undocumented aliens under the immigration code. . . .**[I]t would be inappropriate to impose on the ALJ determinations which properly are allotted to immigration officers. . . .The INS and not the NLRB has the sole and exclusive authority to determine admissibility to and deportability from this country.

Del Ray Tortilleria Inc v Local 76 International Ladies Garment Workers Union, 302 NLRB 216, 219-220 (1991), citations omitted, emphasis added.

Congress established hundreds of immigration visa categories applicable to aliens. Currently some 42 categories of immigrants have legal status without any government issued employment "green card". See, Exhibit 1. Some categories may have the so called "green card" that does not expire but has to be updated. Others may have an employment card that has to be renewed each year. These documented workers are not the sole category of lawfully present immigrants. In fact, some aliens may have one of the temporary work visas (H-1B, H-2B, H-2A, etc) and yet others will have no documentation of lawful status. This leaves many lawfully present immigrants without a means to prove their status or authorization to obtain employment. To deny these under-documented workers benefits under the Act would be contrary not only to the WDCA, but would also give rise to constitutional concerns of due process and discrimination.

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[10] Local 512, Warehouse and Office Workers Union v NLRB (Felbro), supra.

2. TO DENY BENEFITS UNDER THE WDCA TO ALIENS, WHETHER UNDOCUMENTED OR UNDER-DOCUMENTED, WOULD UNDO THE EXCLUSIVITY PROVISION OF THE ACT AND ALLOW FOR UNLIMITED LIABILITY FOR WORK-RELATED INJURIES UNDER COMMON LAW TORT AND THE MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT.

a. WITHOUT THE EXCLUSIVITY PROVISION, THE FLOODGATES WOULD BURST AND A CREATE A CLASS OF CLAIMANTS ABLE TO SUE UNDER TORT LIABILITY AND THE COMMON LAW.

In addition to those constitutional concerns, a denial of benefits to undocumented aliens will have many direct and indirect repercussions. One direct consequence would be an undoing of the exclusivity provision under § 131 of the act. Under this provision, the legislature granted employers subject to the act immunity from independent suits from employees who suffer work related injuries and limited the injured workers' rights to recover for their injuries. Husted v. Consumers Power Co., 376 Mich 41 (1965); Eversman v. Concrete Cutting & Breaking, 463 Mich. 86 (2000); Jones v. General Motors Corp.,, 136 Mich.App. 251 (1984); Harris v. Vernier, 242 Mich.App. 306 (2000); Herbolsheimer v. SMS Holding Co., Inc., 239 Mich.App. 236 (2000), appeal denied 463 Mich. 873. However, if undocumented aliens no longer fall within the scope of the WDCA, then the act will no longer be the exclusive remedy and any undocumented alien who suffers a work related injury will have no other recourse but to bring a common law negligence action to recover for those injuries.

b. UNDOCUMENTED WORKERS WOULD HAVE UNLIMITED REMEDIES FOR WORK-RELATED INJURIES UNDER THE MSAWPA.

It should also be noted that undocumented aliens working for an agricultural employer will also be able to utilize their right to a private cause of action under section 1854(d) of MSAWPA to recover for any work related injuries since they will no longer be subject to the state's workers' compensation act.[11] The MSAWPA had been previously amended in 1995 to undue the effects of the Supreme Court's decision in Adams Fruit Co. v. Barrett ,494 U.S. 638 (1990). In Adams the court held that the exclusivity provision of a states' workers' compensation act did not bar a private cause of action under the MSAWPA for personal injuries suffered due to violations of the act.[12] Id., at 646-647. The United States Congress, at the behest of growers and other employers covered by the act, amended the MSAWPA to ensure that any injuries arising out of a migrant workers' employment was compensated through the states' workers' compensation exclusively. This was done in an effort to prevent the inevitable consequences of the Adams decision. Mainly, a rise in expensive and protracted litigation with the accompanying costs. See, Deck v. Peter Romein's Sons, Inc., 109 F.3d 383, 388-389 (7th Cir. 1997)(citing 141 Cong.Rec. E1943 (daily ed. Oct. 13, 1995), the comments of Representatives Goodling, Clay, Ballenger and Owens).

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[11] According to the Department of Labor, 52% of all migrant farmworkers are unauthorized to work in the United States, the median income of a farmworker family is less than $10,000 per year, and despite their relative poverty, less than 20% make use of social programs such as unemployment insurance, WIC, Medicaid and food stamps. Findings from the National Agricultural Workers Survey 1997-1998: A Demographic Profile of United States Farmworkers. (March 2000)

[12] While Michigan's WDCA exempts some agricultural employers, it does not exempt all agricultural employers. In fact, the majority of hand harvesting labor performed for agricultural employers would fall within the Acts expressed applicability. MCL 418.115

3. DENYING BENEFITS TO UNDOCUMENTED ALIENS WILL ENCOURAGE EMPLOYERS TO HIRE THEM AND RESULT IN THEIR EXPLOITATION.

Immigrant workers in general occupy a large and growing segment of the Michigan workforce engaged in low-wage, high-injury occupations. Despite low wages and poor working conditions, immigrants have a high participation rate in the labor market. Between 1990 and 2000, the foreign-born population in Michigan increased from 355,393 to 523,589, representing a 47.3 percent change.[13] New immigrants who arrived over the last decade accounted for 35% percent of the growth in the civilian labor force in the region of the country of which Michigan is a part.[14] The U.S. Immigration and Naturalization Service used 2000 Census data to estimate that there were 70,000 undocumented immigrants in Michigan in 2000 and that this represented an increase by 47,000 from the estimate of 23,000 in 1990.[15] Undocumented immigrant workers work in some of the lowest paid and highest risk industries.

Economist Paul Leigh has quantified the overall costs of occupational injuries and deaths.[16] Leigh's findings include that the occupations in which immigrants are over

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[13] Michigan Fact Sheet, U.S. Census Data on the Foreign Born, organized by the Migration Policy Institute, available at <<http://www.migrationinformation.org/USFocus/statemap.cfm#>>.

[14] For the purposes of the U.S. Census, Michigan is part of the East North Central Division of the Midwest Region, along with Ohio, Indiana, Illinois, and Wisconsin, *see* SUM, FOGG, HARRINGTON, ET AL. IMMIGRANT WORKERS AND THE GREAT AMERICAN JOB MACHINE: THE CONTRIBUTIONS OF NEW FOREIGN IMMIGRATION TO NATIONAL AND REGIONAL LABOR FORCE GROWTH IN THE 1990S (National Business Roundtable, August 2002), p.21, *available at* << http://www.nupr.neu.edu/12-02/immigration_BRT.PDF>>.

[15] OFFICE OF POLICY AND PLANNING, U.S. IMMIGRATION AND NATURALIZATION SERVICE, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: 1990 TO 2000 (2003), Table 1, *available at* << http://uscis.gov/graphics/shared/aboutus/statistics/Ill_Report_1211.pdf>>.

[16] J. P. Leigh, and Miller, T. R., *Ranking occupations based upon the costs of job-related injuries and diseases,* J OCCUP. ENVIRON. MED

represented, including heavy truck drivers, non-construction laborers, machine operators, janitors, nursing orderlies, construction laborers, assemblers, retail sales workers (not elsewhere specified), miscellaneous machine operators, and carpenters, are also those that contribute the most to total costs.

Employers in low-wage, high injury industries often hire undocumented workers. Some employers hire immigrant workers with a general knowledge that some in their workforce lack authorization to be employed in the U.S. Others have more specific knowledge that many in their workforce are undocumented. In the worst cases, employers seek out undocumented workers for the purpose of taking advantage of them in order to gain an economic advantage. This has been observed by other courts considering the issue. See, Fernandez-Lopez v. Jose Cervino, Inc., 288 N.J. Super 14, 20; 671 A.D.2d 1054 ("the public policy against illegal immigration may actually be subverted by refusing to grant undocumented aliens workers' compensation benefits. Employers might be anxious to hire undocumented aliens rather than citizens or legal residents because they will not be forced to insure against or absorb the costs of industrial accidents."); Dowling v. Slotnik, 244 Conn. 781, 712 A.2d 396 (1998).

The Second Circuit recognized these dynamics in a case arising in the building services industry, a price-sensitive sector with a low-wage, largely immigrant workforce. In Commercial Cleaning Services, LLC v. Colin Service Systems, Inc., 271 F.3d 374, (2d Cir. 2001), a Connecticut building services company alleged that a much larger competitor had "obtained a significant business advantage over other firms in the 'highly competitive' and price-sensitive cleaning services industry," by employing undocumented workers at less than the prevailing wage and failing to pay taxes or worker compensation insurance premiums. Id. at 378-379. Writing for the Second Circuit, Judge Leval reversed the district court's dismissal, concluding

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(1997). 39:(12)1170-1182.

that the small firm had stated a RICO claim that by "illegally hiring undocumented alien labor, [defendant] was able to hire cheaper labor and compete unfairly . . . underbidding the plaintiffs and taking business from them." Id. at 382.

4. THE MAJORITY OF STATES' WORKERS' COMPENSATION LAWS HAVE SPECIFICALLY ALLOWED ALIENS TO RECEIVE BENEFITS.

As discussed above, states have an interest in ensuring that the costs of injuries incident to industry are allocated fairly. To this end, all of the states have adopted some form of workers compensation system, each with its own provisions. Because workers' compensation is completely within the province of state law, each state has exercised its power to shape the provisions and characteristics of its workers' compensation system.

The majority of the States' workers' compensation laws include "aliens" in the definition of covered employees.[17] Entitlement to wage replacement benefits under state workers' compensation laws turns on state statutes and their definition of "worker" or "employee." State courts in California, Colorado, Connecticut, Florida, Georgia, Iowa, Louisiana, Nevada, New Jersey, New York, Pennsylvania, Minnesota and Texas have specifically held that undocumented workers are covered under their state workers' compensation laws.[18]

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[17] *See,* ARIZ. REV. STAT. § 23-901(5)(b):() CAL. LAB. CODE § 3351(a) FLA. STAT. ch. 440.02(14)(a); IL COMP. STAT. 820/305(1) b (West 2002); KY. REV. STAT. ANN. § 342-0011(21) ; MICH. STAT. ANN. § 17.237(161)(1)(I); MINN. STAT. § 176.011 subd.9(1); MISS. CODE ANN. § 71-3-27; MONT. CODE ANN. § 39-71-118(1)(a) ; NEB. REV. STAT. § § 48-115(2), 48-144 ; NEV. REV. STAT. ANN. § 616A.105 ; N.M. STAT. ANN. 52-3-3 ; N.C. GEN. STAT. 97-2(2) ; N.D. CENT. CODE § 65-01-02(17)(a)(2) ; OHIO REV. CODE ANN. 4123.01(A)(1)(b) ; S.C. CODE ANN. § 42-1-130; TEX. LAB. CODE § § 401.011, 406.092; UTAH CODE ANN. § 34A-2-104(1)(b) ; VA. CODE ANN. 65.2-101 .

[18] *See,* Champion Auto Body v. Gallegos, *950 P.2d 671 (Colo. Ct. App. 1997);* Gene's Harvesting v. Rodriguez, *421 So.2d 701, 701 (Fla. Dist. Ct. App. 1982);* Pablo D. Artiga v. M.A. Patout and Son, *671 So.2d*

Only one state's statute, Wyoming's, explicitly denies workers' compensation benefits to undocumented immigrants.[19]

It should be noted that in 1999, the Supreme Court of Virginia held that an undocumented immigrant was not entitled to workers' compensation benefits.[20] Virginia is the only state in which a court has reached this conclusion in the absence of a clear statutory mandate to exclude undocumented immigrants from a state's worker compensation system.[21] Virginia employers soon realized that the prospect of being sued in tort for workplace injuries was much less appealing than paying workers' compensation premiums. Employers, concerned about facing huge judgments in tort litigation, went back to the legislature to amend state law so that it specifically includes, "Every person, including aliens

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1138, 1139 (La. Ct. App. 1996); Lang v. Landeros, *1996 Ok Civ. App. 4; 918 P.2d 404 (Okla. Ct. App. 1996);* Gayton v. Gage Carolina Metals Inc., *560 S.E.2d 870 (N.C. Ct. App. 2002);* Ruiz v. Belk Masonry Co., *559 S.E.2d. 249 (N.C. Ct. App. 2002);* Rivera v. Trapp, *519 S.E.2d 777 (N.C. Ct. App 1999):* Mendoza v. Monmoth Recycling Corp., *672 A.2d 221 (N.J. Super. Ct. 1996);* The Reinforced Earth Company v. Workers' Compensation Appeal Board, *2002 WL 31476901, __ A.2d ___ (Pa. . 2002);* Dowling v. Slotnik, *712 A.2d 396, 403 (1998);* Dynasty Sample Company v. Beltrain, *479 S.E.2d 773 (Ga. 1996);* Commercial Standard Fire and Marine Co. v. Galindo, *484 S.W.2d 635, 637 (Tex. Civ. App. 1972);* Fernandez-Lopez v. Jose Cervino, Inc., *288 N.J. Super 14, 20, 671 A.D.2d 1051, 1054 (N.J. Super. Ct. App. Div. 1996). See, also,* Iowa Erosion Control v. Sanchez, *599 N.W.2d 711, 715 (Iowa, 1999) ("The employer has furnished no authority to support its view that, on grounds of policy or morality, [decedent worker's surviving mother's] immigration status has any bearing on her entitlement to benefits.");* Del Taco v. Workers' Compensation Appeals Board, *79 Cal. App. 4th 1437, 1439-1442 (Cal. Ct. App. 2000) (holding that the California workers' compensation laws apply to aliens but do not "expressly authorize vocational rehabilitation benefits for an 'illegal worker'" who is not otherwise "medically eligible."*

[19] WYO. STAT. ANN. § 27-14-102 (a)(vii) (LEXIS).

[20] Granados v. Windson Dev. Corp, 509 SE2d 290 (1999).

[21] National Employment Law Project, Immigrant Worker Project; Low Pay, High Risk: State Models for Advancing Immigrant Workers' Rights (November 2003). Can be found at <<http://www.nelp.org/docUploads/lphrch5112603%2Epdf>>

and minors, in the service of another under any contract of hire or apprenticeship, written or implied, whether lawfully or unlawfully employed."[22] When the governor vetoed the inclusive legislation, the bill had enough support in the legislature to override the veto. NELP, Immigrant Project, supra. Surprisingly, Virginia has thus become one of the model states to cover immigrant workers under its workers' compensation system. Id.

The WDCA does not define "alien", and does not specify any type of alien it meant to exclude or include from the act. While it does not define "alien", it clearly includes the word "alien", as evidence that, despite the specific category of immigration status, any alien is subject to the act. To infer otherwise would expose employers to tort liability by excluding a class of claimants from the exclusive remedy provision of the act. For these reasons, undocumented aliens are included in the Act's definition of "alien". There is simply no provision of State or Federal law that provides any type of exemption upon which Defendant-Appellee can rely in support of its claims to the contrary.

C. THE PLAINTIFFS WERE NOT "UNABLE TO OBTAIN OR PERFORM WORK BECAUSE OF...COMMISSION OF A CRIME" WITHIN THE MEANING OF THE FINAL SENTENCE OF MCL 418.361(1).

1. THE IMMIGRATION REFORM AND CONTROL ACT OF 1986 (IRCA) DOES NOT PREVENT ALIENS FROM RECEIVING BENEFITS UNDER A STATES' WORKERS' COMPENSATION LAW.

Section §361(1) of the Act makes an employer not liable for the payment of workers' compensation for periods that an employee is "unable to obtain or perform work because of imprisonment or commission of a crime." MCL 418.361(1). Defendant-Appellee argues

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[22] VA. CODE ANN. 65.2-101 (Matthew Bender, LEXIS).

that because Plaintiff-Appellant acknowledged that he was an undocumented alien, which is in violation of federal law, he is committing a crime and is therefore ineligible for benefits under § 361(1) of the Act. However, Congress and our federal Courts do not agree.

In 1986, Congress enacted the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (1986). This statute "makes it unlawful for employers to knowingly hire undocumented aliens, 8 USC § 1324(a), and for undocumented aliens to knowingly use false documents to obtain jobs, 8 USC § 1324c(a)(3)[;] **IRCA does not explicitly make it unlawful for undocumented aliens to work.**" Hoffman Plastic Compounds Inc v NLRB, 345 US App DC 1, 32 (2001), cert granted 122 S Ct 23 (2001), emphasis added; but see also, Local 512, Warehouse and Office Workers Union v NLRB (Felbro), supra. at 719; NLRB v APRA Fuel Oil Buyer Group Inc, 134 F3d 50, 55 (1997). "IRCA thus demonstrates Congress's intent to focus on employers, not employees, in deterring unlawful employment relationships. Id., at 56. Therefore, under IRCA, it is a crime for the employer to knowingly hire, but not for an undocumented worker to work.

In addition, neither the Workers' Compensation ALJ nor Appellate Commission has the expertise to make findings regarding a person's legal or illegal immigration status in this country.

> The Court of Appeals characterized this nation's immigration laws and regulations as exceedingly complex, bearing a "striking resemblance . . . to King Minos' labyrinth in ancient Crete. Even if an undocumented worker should fall within one of the 52 categories of people who may not enter the United States, the Court enumerated some of the "many circumstances which prevent a 'deportable alien' from actual deportation under INS standards. Consequently the Ninth Circuit concluded, as did the Supreme Court [], "[t]here is no assurance that a (person) subject to deportation will ever be deported."

Del Ray Tortilleria Inc, supra. at 219-220.

Defendant-Appellee can produce no evidence that Plaintiff-Appellants have been deported, or that they are even deportable. INS (now BICE) has made no such decision, and Plaintiff-Appellants still reside in the United States.

2. THE COMMISSION OF A CRIME PROVISION OF THE WDCA ONLY APPLIES TO THOSE INJURED WORKERS WHO ARE INCARCERATED OR OTHERWISE PHYSICALLY REMOVED FROM THE WORKFORCE BECAUSE OF THEIR COMMISSION OF A CRIME.

It is helpful to look at the legislature's intent in adding the "commission of a crime" exception to the WDCA. With its 1985 addition of the "commission of a crime" language to the WDCA, the Michigan Legislature intended to temporarily suspend wage-loss benefits of workers who were removed from the workforce due to incarceration or flight from the jurisdiction to avoid sentencing. See Bush v Murco, Inc, 1986 WCABO 1079, 1081 (1986); Tanney v Advance Sheet Metal, Inc, 4 MIWCLR 1287 #14 (Mich Work Comp App Com 1992). When the Legislature mandated this temporary suspension of wage-loss benefits, it studiously refrained from generally disqualifying convicted offenders from receiving wage-loss benefits. Convicted offenders who are not sentenced to incarceration or similar restraints on liberty are not disqualified simply because they have committed a crime in the past. In Sweatt v Department of Corrections, the court stated that " [a person's] action in committing a crime [cannot] be viewed generally as a decision to withdraw from the workplace for those periods after he had served the appropriate amount of time in prison for his criminal misconduct." 247 Mich App 555, 562; 637 NW2d 811, 815 (2001), lv gtd, 466 Mich 860; 643 NW2d 579 (2002). It follows that undocumented workers, such as plaintiffs, who have neither been charged, convicted, sentenced or imprisoned with violating the IRCA, are not among the extraordinarily narrow class of individuals liable to the suspension of workers'

compensation benefits. Nothing in the WDCA provides for a "permanent forfeiture of benefits because of imprisonment or commission of a crime. . . ." Id., at 561.

Cases decided by the WCAC, previously the Workers' Compensation Appeal Board ("WCAB"), provide insight into the legislative intent underlying the 1985 amendment. In Bush, 1986 WCABO at 1081, the WCAB discerned that the primary motivation behind the enactment of 361(1) and 301(10) was Sims v RD Brooks, Inc, 389 Mich 91(1973), and the line of cases that followed in which incarcerated plaintiffs were granted wage replacement benefits in spite of their incarceration. Specifically, it stated that:

> "The Legislature by enacting the above-mentioned [Amendment] cured, what to some seemed, an apparent injustice. Incarceration, it should be noted, both placed plaintiff on the 'public rolls' and rendered him incapable of accepting 'favored work.' The former runs counter to the purpose of the WDCA. The latter prevents the employer from mitigating his compensation liability." Bush, 1986 WCABO at 1081.

In the case at bar, the Plaintiff-Appellants were neither on the "public rolls," nor were they physically removed from the work force due to incarceration as a result of the crime they committed. They therefore do not fall within the narrow class of claimants which the Legislature intended, by subsection 361(1), to disqualify.

3. DUE TO THE CAUSATION REQUIREMENT OF THE WDCA SUBSECTION 361(1), THE "COMMISSION" OF A CRIME, ALONE, IS NOT ENOUGH TO BAR A WORKER FROM RECEIVING BENEFITS.

The statute deals with two potential circumstances that would leave an employee "unable to obtain or perform work:" "imprisonment" and the "commission of a crime." In the case of imprisonment, it is clear that an employee is unable to obtain or perform work. But when, as in the case at bar, plaintiffs are precluded from wage-loss benefits due to their "commission" of a crime, the standard is more vague, in that a conviction does not seem a

necessary requirement for the suspension of benefits. But, as the WCAC recognized in Bush, pre-conviction divestments of benefits may pose some due process problems, in that they run "counter to a cardinal principle of our system of jurisprudence, that is, the presumption of innocence." Bush, 1986 WCABO at 1082. In that case the WCAC went on to state that "the legislative enactments of Section 310(10) and 361(1) were in response to cases such as Simms, supra, involving postconviction (by plea or verdict) confinements." Id. Accordingly, they limited the application of subsection 361(1) to "those periods of plaintiff's incarceration which occurred after conviction." Id.

Indeed, other existing precedents require that, in order for commission of a crime to be deemed the cause of the employee's inability to obtain or perform work, the commission of a crime must be accompanied by either a sentence or an affirmative action undertaken by the worker to avoid sentencing that thereby effectively removes the employee from the work force. See, Tanney supra. In Tanney, the WCAC suspended plaintiff's benefits pursuant to subsection 361(1) after he had fled from the jurisdiction to avoid sentencing. Tanney, 4 MIWCLR 1287 at *___. The WCAC was careful to note that the plaintiff had pled guilty; "[his] guilty plea had been accepted and bench warrants [had] been issued [for his arrest]" after he had fled from the jurisdiction to avoid sentencing. Tanney, 4 MIWCLR 1287 at *___. Because he was a fugitive from justice after conviction, the claimant in Tanney was, for all practical purposes, as separated from the workforce as an inmate. In Weathersby v City of Grand Rapids, the employer relied on subsection 361(1) to discontinue the plaintiff's workers' compensation benefits after the plaintiff was sentenced to sixty months' probation. 4 MIWCLR 1306 at *___. The Magistrate ordered the defendant to reinstate benefits and the WCAC affirmed, reasoning that:

> Since the plaintiff [had] never been imprisoned or ... jailed with regard to the drug charge, nothing regarding that charge, such as fleeing the jurisdiction or community service obligations, for example, [had] ... kept her from obtaining or performing work. Bush v Murco, Inc, 1986 WCABO 1079. ... Section 361(1) precludes payment

> to individuals who would be working anyway, even if they were not disabled, who are in no position to accept reasonable employment, favored work [sic], so that the obligation to pay them weekly benefits can be mitigated. It is not until the workers' compensation claimant is convicted or pleads guilty to a crime in a court of competent jurisdiction and is imprisoned and thus [or otherwise as we have explained] becomes unavailable to obtain or perform work that Sec. 361 takes over. Weathersby, 4 MIWCLR 1306 at *___. (claimant plead guilty to a crime, fled to avoid prosecution, and had a bench warrant issued against him).

In addition, once a former employee with a previous work-related injury for which benefits have been temporarily barred is released from imprisonment into the workforce, such worker is entitled to reinstatement of benefits so long as his loss of earning capacity is at least partly due to the work related injury. Sweatt v. Department of Corrections, 468 Mich. 172 (2003).

Although there is scant case law specifically interpreting this provision of the WDCA, this court's decision in Sweatt provides guidance in analyzing the conditions under which a worker is precluded by subsection 361(1) from receiving wage-loss benefits. Sweatt, 468 Mich at 174. In Sweatt, the plaintiff sustained an injury arising from his work as a corrections officer. Id. at 175. He collected benefits from 1989 until 1995, at which time he was incarcerated due to a drug conviction. Id. His wage-loss benefits were temporarily suspended pursuant to subsection 361(1). Id. Upon release from prison, the Department of Corrections refused to reinstate his benefits. Id. at 176. Citing a provision of a Department of Corrections statute that prohibited the Department from employing convicted felons, in conjunction with 361(1) the Department argued that the benefit suspension should not be lifted because the claimant remained unable to obtain work despite being released from prison. Id. Rejecting this position, the Magistrate granted an open award of benefits which was upheld by the WCAC. Id. On the defendant's appeal, the Court of Appeals affirmed and did not relieve the Department from having to pay wage-loss benefits. Id. at 177.

The Court of Appeals majority stated that the Legislature intended the "commission of a crime" amendment "to bar compensation in those situations where the claimant was

removed from the workforce." Sweatt, 247 Mich App at 567. It followed that the provision "did not apply to the plaintiff [Sweatt] because he had reentered the workforce following his release from incarceration." Therefore, the majority held that 361(1) did not apply unless the claimant was physically removed from the labor market. Id. This Court reversed the decision and remanded the case for a determination of "what portion of plaintiff's loss of wage earning capacity is fairly attributable to his work related injury or to his 'commission of a crime'." Sweat, 468 at 185 footnote 8.

This Court specifically found that Sweatt was entitled to wage-loss benefits to the extent that his earning capacity was reduced because of his work related injury. Sweatt, 468 Mich at 187 footnote 11. This Court stated that the legislative intent behind the "imprisonment or commission of a crime" language in section 361(1) was that "the employers will not be liable for an employee's loss of wage -earning capacity that is attributable to 'imprisonment or commission of a crime'." Id. at 187 footnote 10. The defendants argued that no benefits were owed to the plaintiff because the exception in section 361(1) only applies when the employee is no longer able to work for a specific employer. Id. at 185 footnote 7. But this Court found that there was no basis in subsection 361(1) for interpreting work-availability to mean a claimant's ability to obtain work with a specific employer. Id. It follows that the test is not whether an employee is unable to work for the previous employer, but instead whether the commission of the crime prevents the employee from obtaining or performing work with any employer.

Even if this court finds that the plaintiffs fall within the exception outlined in section 361(1) of the WDCA, this Court's decision in Sweatt provides that this will only serve to limit the entitlement to benefits available to the them and will not act as a complete bar. Id. at 185. In Sweatt, this Court reiterated the Court of Appeals determination that the purpose of the WDCA was "to compensate a claimant for lost earning capacity caused by a work

related injury. . . ." Id. at 186 (citing Sweatt supra at 247 Mich.App. 555,556 (2001)). This Court then went on to state that a "'[d]efendant must still pay benefits to plaintiff as compensation for his loss of wage-earning capacity attributable to plaintiff's work-related injury, assuming that some or all of plaintiff's loss of wage-earning capacity is attributable to plaintiff's work related injury." Id. at 187. In other words, if the loss of earning capacity is in any way attributable to the work-related injury, the claimant is still entitled to benefits regardless of whether another portion of his loss of earning capacity can be attributed to imprisonment or the commission of a crime. Id. at 174.

By parity of reasoning, the "commission of a crime" disqualification should not bar the plaintiffs in this case from recovering wage-loss benefits since they have not been removed from the workforce.

4. THERE CAN BE NO COMMISSION OF A CRIME WITHOUT A CONVICTION, AFTER DUE PROCESS.

Both the United States Constitution and the Michigan State Constitution state that "[n]o person. . . shall be deprived of life, liberty or property, without due process of law."[23] This guarantee of due process comes with the presumption of innocence in any criminal trial. In other words, a person cannot be convicted of a crime until and only when their guilt has been proven beyond a reasonable doubt. People v. Goss, 446 Mich 587, 596 (citing In re Winship, 397 U.S. 358, 364,(1970)). In addition, the accused must be convicted by a jury and judges are not allowed to "direct a verdict either in whole or in part. Id.

Further guidance on this point can be found in Weathersby v City of Grand Rapids, 4 MIWCLR 1306 (1992) which provides:

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[23] U.S. Const., Am. XIV, and Michigan Const. 1963, art. 1, § 17.

> No trial had occurred with respect to the criminal charge nor had there been any imprisonment related to the charge. Such being the case, Plaintiff's motion was granted. By asking for admission of such evidence, Defendant was essentially asking this Court to conduct a criminal trial to determine the validity of pending criminal charges against the Plaintiff. **It is not within the jurisdiction of the Bureau of Workers' Disability Compensation to find, prior to a criminal trial, whether crimes have been committed.**

Id., emphasis added.

In this case, no jury has convicted the Plaintiff-Appellants of any crime and so they are presumed innocent under both state and federal law.

5. AN ALIEN CANNOT BE FOUND TO BE "ILLEGAL" WITHOUT AN ORDER OF DEPORTATION, AFTER DUE PROCESS.

There is nothing in the federal immigration law that states that a person who is present in the United States without permission is committing crime. Mere unauthorized presence is a civil violation of law, not a criminal one. 8 USC 1324d (INA §274D). The only instance in which unauthorized presence would constitute a crime is when the person has already received a final order of removal and is deportable under 8 USC 1227(a). See, 8 USC 1253 (INA §243). Del Ray Tortilleria Inc v Local 76 International Ladies Garment Workers Union, 302 NLRB 216 (1991).

In this case, there has been no final order of removal issued for either Plaintiff-Appellant nor have they been found to have committed a criminal violation of immigration law. As such, they are not committing a crime nor have they been adjudicated "illegal".

D. THE COURT OF APPEALS INCORRECTLY DETERMINED THAT THE PLAINTIFFS SHOULD NOT RECEIVE WORKERS' COMPENSATION BENEFITS AFTER THE DATE WHEN THE DEFENDANT DISCOVERED THEIR STATUS AS UNDOCUMENTED ALIENS.

Article VI of the Constitution provides that the laws of the US "shall be the supreme Law of the Land." US Const, art VI, cl 2. Following this, the federal law may expressly or

impliedly preempt a state law that conflicts with the federal law. See, Hines v Davidowitz, 312 US 52, 67 (1941).("[a state law that] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress is impliedly preempted by the federal law with which it conflicts.") Thus, where fulfilling the aims of a state policy conflicts with the administration of a federal policy, conflict preemption requires that the state policy yield to the federal law.

As discussed below, federal immigration law neither expressly nor impliedly preempts Michigan from providing workers' compensation benefits to undocumented workers. There is no express provision in the federal immigration law preempting states from providing workers' compensation benefits to undocumented workers. Moreover, as discussed below, providing workers' compensation benefits to undocumented workers does not conflict with federal immigration law; in fact, it promotes the goals of federal immigration law.

1. IRCA DOES NOT PREEMPT THE WDCA.

Outside of express preemption, there is no presumption that federal law preempts state law.[24] See Hines, at 68 fn22 (1941) ("It is true that where the Constitution does not of

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[24] In fact, some cases go so far as to say that the Court "is reluctant to infer pre-emption" (*Bldg and Construction Trades Council of the Metropolitan District v. Associated Builders and Contractors of Massachusetts / Rhode Island, Inc. et al.*, 507 U.S. 218, 224 (1993)) and "[c]onsideration under the Supremacy Clause starts with the presumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). However, both these cases cite *Rice v. Santa Fe Elevator Corp.* which limits this reluctance to infer pre-emption to subject matters traditionally regulated by states. This reluctance probably would not apply to immigration, which is a field traditionally regulated by the federal government. *See DeCanas v. Bica*, 424 U.S. 351, 354 (1976) ("Power to regulate immigration is exclusively a federal power."). However, the Court has previously stated that not all state regulations of immigrants are a regulation of immigration

itself prohibit state action...and where the Congress, while regulating related matters, has purposely left untouched a distinctive part of a subject which is peculiarly adapted to local regulation, the state may legislate concerning such local matters which Congress could have covered, but did not. (citations omitted)). See also Locke v. United States, 529 U.S. 89, 109 (2000), ("It is fundamental in our federal structure that States have vast residual powers. Those powers, unless constrained or displaced by the existence of federal authority or by proper federal enactments, are often exercised in concurrence with those of the National Government. McCulloch v. Maryland, 4 Wheat. 316 (1819).").

There is nothing in the language of the federal immigration law that pre-empts states from providing workers' compensation benefits to undocumented workers. Only one section of the IRCA expressly preempts state action: "[t]he provisions of this section preempt any State or local law imposing civil or criminal sanctions ... upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 USC §1324a(h)(2). However, workers' compensation benefits are not civil or criminal sanctions as described in §1324a(h)(2), and are not expressly pre-empted. See, Dowling 244 Conn. 781, 793; 712 A.2d 396, 403, "the commissioner's award of workers' compensation benefits to the claimant does not constitute a civil sanction that is preempted by §1324a(h), the express preemption provision of the Immigration Reform Act."

The IRCA sought to make undocumented workers less attractive to U.S. employers and thereby to reduce employers' incentives to hire such workers. Notably, IRCA focuses on the need to change employers' behavior and motivations.[25] With IRCA came the

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and thus not per se pre-empted. *See id.* at 355 ("But the Court has never held that every state enactment which in any way deals with a liens is a regulation of immigration and thus per se pre-empted by this constitutional power [of regulating immigration], whether latent or exercised.").

[25]The Court of Appeals for the Second Circuit recognized this in *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50 (2d Cir. 1997),

introduction of "employer sanctions" as a statutory mechanism for increasing the costs of hiring undocumented workers. Employer sanctions make it illegal for employers knowingly to hire aliens not authorized to be employed.[26] Under the IRCA, if an immigrant job applicant is unable to present the required documentation, she cannot legally be hired.[27] If an employer unknowingly hires an unauthorized alien, or if the alien becomes unauthorized while employed, the employer is compelled to discharge the worker upon discovery of the worker's unauthorized status. An employer who hires such aliens is subject to an escalating series of fines, ranging from $250 to $10,000.[28] Criminal penalties and additional fines may be imposed on employers who engage in a "pattern or practice" of hiring undocumented immigrants.[29] IRCA also made it a crime for an unauthorized alien to present fraudulent documents to his or her employer.[30] Unauthorized immigrants who use or attempt to use fraudulent documents to subvert the employer verification system established by IRCA are also subject to fines and criminal prosecution.[31]

If Congress had intended to further pre-empt the states from providing benefits such as workers' compensation, it would have expressed this intention as it did under 8 U.S.C.A. §1324a(h)(2).

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writing that "IRCA . . . demonstrates Congress's intent to focus on employers, not employees, in deterring unlawful employment relationships," *id.* at 56, and that "IRCA was passed to reduce the incentives for employers to hire illegal aliens," *id.* at 55. The Court of Appeals for the Eleventh Circuit reached the same conclusion in *Patel v. Quality Inn South*, 846 F.2d 700, 704 (11th Cir. 1988), stating that "Congress enacted the IRCA to reduce illegal immigration by eliminating employers' economic incentive to hire undocumented aliens."

[26] *See*, 8 USC §1324a(a)(1).

[27] *Id.*

[28] *Id.* § 1324a(e)(4)(A).

[29] *Id.* § 1324a(f).

[30] Id. § 1324c.

[31] Id. § 1324c§; 18 USC § 1546(b).

2. WORKERS' COMPENSATION IS AN AREA THAT IS TRADITIONALLY REGULATED BY THE STATES, THUS THERE IS A PRESUMPTION THAT IT IS NOT PREEMPTED BY FEDERAL LAW.

If the state legislation is an exercise of state police powers, there is a presumption of non-preemption. See Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)("[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."). See also, Locke, supra, at 108 (2000); Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) ("assumption" is triggered where "field which Congress is said to have pre-empted has been traditionally occupied by the States"); California v. ARC America Corp., 109 S.Ct. 1661 (1989)

The workers' compensation system replaces the traditional common-law right of action an injured worker would have against a negligent employer. See, Castro-Mendoza v. Monmouth Recycling Corporation, 288 N.J. Super. 240,___ ; 672 A.2d 221, 226 (1996) ("workers' compensation rests upon both contract and tort principles – the contract right in effect substitutes for the tort right an employee would otherwise have."). As discussed above, states have an interest in ensuring that the costs of injuries incident to industry are allocated fairly. To this end, all of the states have adopted some form of workers' compensation system, each with its own provisions. Because workers' compensation is completely within the province of state law, each state has exercised its power to shape the provisions and characteristics of its workers' compensation system.

As noted above, Michigan's WDCA and the majority of the States' workers' compensation laws include "aliens" in the definition of covered employees.[32] Entitlement to wage replacement benefits under state workers' compensation laws turns on state statutes

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[32] *See,* FOOTNOTE 15, SUPRA.

and their definition of "worker" or "employee." State courts in California, Colorado, Connecticut, Florida, Georgia, Iowa, Louisiana, Nevada, New Jersey, New York, Pennsylvania, and Texas have specifically held that undocumented workers are covered under their state workers' compensation laws.[33] Only one state, Wyoming, explicitly denies workers' compensation benefits to undocumented immigrants.[34]

In Michigan, workers' compensation benefits include providing for loss of earning capacity. The analysis of earning capacity is also a matter of state law. Under Michigan law, the focus of the analysis is on the effect of the injury on earning capacity – immigration status is not at issue. See, Sweatt, at 186. ("there must be a linkage between the disabling work-related injury and the reduction in pay.") Furthermore, it has been held that the legislature intended to include undocumented aliens within the scope of the WDCA. Sanchez. 254 at 663.

Because undocumented workers are included under the WDCA and the framework within which benefits are determined are traditionally and completely governed by state law in Michigan without reference to an employees immigration status, there is a presumption that Congress did not preempt the state's power to define and implement its workers' compensation system.

3. THERE IS NO INDICATION THAT CONGRESS INTENDED TO PREEMPT WORKERS' COMPENSATION IN ENACTING THE IRCA.

There is nothing to indicate that in enacting the IRCA, Congress intended to pre-empt states' ability to provide workers compensation benefit systems to all workers who are injured on the job. See Shaw v. Delta Airlines, 463 US 85, 95 (1983). "[the] purpose of Congress is the ultimate touchstone" of the pre-emption inquiry," California Federal Savings

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[33] *See,* Footnote 16 supra.

[34] WYO. STAT. ANN. § 27-14-102 (a)(vii) (LEXIS).§§

and Loan v. Guerra, 479 US 272, 280 (1987). In fact, IRCA explicitly authorized funds for the U.S. Department of Labor's Wage and Hour Division to enforce employment standards laws on behalf of undocumented workers.[35] Congress recognized, as §111(d) of the IRCA explicitly states, that such enforcement furthers IRCA's purpose by diminishing the incentive for employers to hire undocumented workers in order to take advantage of a more easily exploitable workforce. IRCA Section 111(d) reads:

> There are authorized to be appropriated . . . such sums as may be necessary to the Department of Labor for enforcement activities of the Wage and Hour Division . . . in order to deter the employment of unauthorized aliens and remove the economic incentive for employers to exploit and use such aliens.

Where federal law does not expressly prohibit state legislation, federal pre-emption is not presumed. Instead, the Supreme Court's approach has been to attempt to "reconcile 'the operation of both statutory schemes...rather than holding one [scheme] completely ousted.'" Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 127 & fn8 (1973) (quoting Silver v. New York Stock Exchange, 373 U.S. 341, 357 (1963)) (citing a string of "decisions extending back to the turn of the century" which support this approach). Pre-emption should be found "'only to the extent necessary to protect the achievement of the aims of the [federal law]." Merrill Lynch, 414 U.S. at 127 (quoting Silver, 373 U.S. at 361). See also, Dalton v. Little Rock Family Planning Services, 516 U.S. 474, 476 (1996) (holding that in preemption cases, federal courts should invalidate only the portion of the state law necessary to resolve the case before it). In the present case, not only is there no conflict between state and federal law, the state and federal laws in question work in harmony.

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[35] *See*, IRCA § 111(d).

4. THERE IS NO CONFLICT BETWEEN THE FEDERAL IMMIGRATION LAW AND MICHIGANS' WORKERS' COMPENSATION SYSTEM WHICH PROVIDES BENEFITS TO INJURED WORKERS REGARDLESS OF IMMIGRATION STATUS.

The goal of the IRCA is to eliminate the incentive for employers to hire undocumented workers. As §111(d) of the IRCA clearly states, Congress sought to deter employers from hiring undocumented workers by directing the vigorous enforcement of employment laws on behalf of those workers. Moreover, the legislative history of the IRCA makes it clear that Congress intended the full panoply of state and federal labor and employment laws, including the National Labor Relations Act, to be enforced on behalf of undocumented workers:

> [T]he committee does not intend that any provision of this Act would limit the powers of State and Federal labor standards agencies such as the . . . Wage and Hour Division of the Department of Labor, . . . the National Labor Relations Board, . . . in conformity with existing law, to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by these agencies. To do otherwise would be counter-productive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment.

H.R. Rep. No. 99-682, pt. 2, at 8-9, reprinted in 1986 U.S.C.C.A.N. 5662 (1986) (emphasis added).

The goal of Michigans' workers compensation system is to ensure that the costs of injuries are distributed proportionately is consistent with federal immigration law. So long as undocumented workers receive workers' compensation benefits, the costs of their work-related injuries are borne by employers and limited to the statute. Either the employers would reap a windfall or prices of goods and services generated by undocumented workers would fail to reflect the costs of workplace accidents, thus generating a disproportionate demand for those goods and services. Either way, employers would have an economic incentive to seek out and hire undocumented workers.

Thus it is clear that, rather than conflicting with the federal immigration law and policy, the Michigan workers' compensation system furthers the goals of immigration law

provided that it continues to provide benefits to all workers injured on the job, regardless of immigration status.

5. FOLLOWING THE PASSAGE OF THE IRCA, OTHER STATES HAVE RE-ASSERTED THEIR RIGHT TO PROVIDE WORKERS' COMPENSATION BENEFITS FOR UNDOCUMENTED WORKERS.

Other state courts considering the question of whether an undocumented worker is covered by a state's workers' compensation law, have concluded that "[t]here is nothing in the IRCA which indicates that an individual, hired by an employer in violation of its provisions, is not an "employee" under federal or state law. As such, the IRCA does not, in and of itself, preclude an undocumented alien from being considered an "employee" for purposes of the Act." The Reinforced Earth Company v. Workers' Compensation Appeal Board, 749 A.2d 1036, 1038 (Pa. Commw. Ct. 2000); Dowling, 244 Conn. 781, 793; 712 A.2d 396, 403, "the commissioner's award of worker's compensation benefits to the claimant does not constitute a civil sanction that is preempted by §1324a(h), the express preemption provision of the Immigration Reform Act." Noting that "The Immigration Reform Act itself gives no indication that Congress intended the act to preempt state laws whenever state laws operate to benefit aliens. Indeed, 'it is clear from [the] legislative history [of the Immigration Reform Act] that Congress anticipated some conflict between the new statute and ... various state... statutes ... As explained in the House Report: 'It is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law..." citing Montero v. Immigration & Naturalization Service, 124 F.3d 394.

The Connecticut court went on to conclude that "there is no merit to the ... argument that providing workers' compensation benefits to undocumented aliens would stand as an obstacle to 'removing the employment 'magnet' that draws undocumented aliens into the country.' (citing Montero). Potential eligibility for workers' compensation benefits in the event of a work-related injury realistically cannot be described as an incentive for

undocumented aliens to enter this country illegally.... More important, excluding such workers from the pool of eligible employees would relieve employers from the obligation of obtaining workers' compensation coverage for such employees and thereby contravene the purpose of the Immigration Reform Act by creating a financial incentive for unscrupulous employers to hire undocumented workers." Dowling, 244 Conn. 796; 712 A2d 404.

6. THE SUPREME COURT'S HOLDING IN HOFFMAN PLASTIC COMPOUNDS V. NLRB, 535 US 137 (2002) DOES NOT CHANGE THE ANALYSIS THAT WORKERS' COMPENSATION IS NOT PREEMPTED BY FEDERAL LAW.

a. THE HOLDING IN HOFFMAN WAS BASED ON A FEDERAL AGENCY'S EXPRESS DUTY TO DEFER TO OTHER FEDERAL LAWS WHEN DISCRETIONARY RELIEF IS CONSIDERED.

The Supreme Court's decision in Hoffman Plastic Compounds v. NLRB, 535 US 137 (2002), did nothing to change the insurance and public policy principles in favor of applying the workers' compensation laws to all injured workers, regardless of their status.

In Hoffman, the Court did not address the issue of federal pre-emption of state laws, much less pre-emption of workers' compensation laws. Rather, in that case, the Court considered whether the National Labor Relations Board (NLRB) had authority to award the relief of backpay to a worker, who had presented false documents when hired, but was subsequently discovered to be undocumented, under the National Labor Relations Act (NLRA). The Supreme Court held that the award of backpay, in that case, "is foreclosed by federal immigration policy, as expressed by Congress in the Immigration Reform and Control Act of 1986 (IRCA)." Id. at 140.

The NLRB is the federal agency charged with enforcing the NLRA, the federal law protecting employees' rights to organize and bargain collectively. Under the NLRA, the NLRB is empowered to "issue and cause to be served on [an employer found to have violated the Act] an order requiring such person to cease and desist from such unfair labor

practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act." 29 U.S.C. §160(c). However, the NLRA also provides that "[n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause." Id. Neither the NLRA nor the IRCA prohibits the award of back pay to undocumented workers.

The Supreme Court took the position that another important congressional objective weighed against allowing the NLRB to order backpay in Hoffman. In particular, the Court found that the NLRB's authority to fashion remedies under the NLRA was "limited by federal immigration policy," Hoffman, 535 US at 146, and observed that the NLRB had "no authority to enforce or administer" the policies underlying the IRCA. Id. at 149. Recalling its reasoning in Southern Steamship Co. v. NLRB, 316 US 31, 47 (1942), the Court stated that that "the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important congressional objectives." Hoffman, at 145.

The federal immigration policy to which the Court referred is found in the Immigration Reform and Control Act of 1986 (IRCA)[36], which established "an extensive 'employment verification system, ..., designed to deny employment to aliens who (a) are not lawfully present in the United States, or (b) are not lawfully authorized to work in the United States." Hoffman, 535 US at 147. Based on its reading of the IRCA, the Supreme Court went on to reason that "[t]he Board asks that we ... allow it to award backpay to an illegal alien for years of work not performed, for wages that could not lawfully been earned, and for a job obtained in the first instance by a criminal fraud", that this "runs counter to policies underlying the IRCA, policies the Board has no authority to enforce or administer."

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[36] The full text of the IRCA is available *at* <http://www.oig.lsc.gov/legis/irca86.htm>.

Essentially, the Court in Hoffman based its reasoning on a concern about indirectly encouraging future violations of the IRCA. Id.. at 148-149. The Court found that allowing the NLRB to award post-termination backpay would require the recipient to mitigate the damages by seeking other work, which could only occur through the employer's or worker's subversion of the work verification rules of the IRCA. Id. Because of this, the Court concluded that "the award lies beyond the bounds of the Board's remedial discretion." Id., at 149.

There are a number of reasons why this decision does not provide a basis for concluding that federal immigration law trumps Michigans' state law governing workers' compensation. Hoffman does not establish that an award of unpaid wages to workers for work actually performed runs counter to the IRCA. See, Flores v. Albertsons, 2002 US Dist LEXIS 6171, at *18-19 (CD Cal, Apr. 9, 2002). Workers' compensation benefits are awarded as a remedy for an injury incurred during work that was actually performed. Within the context of workers' compensation, benefits are determined based on the injury. The nature of injury does not change depending on immigration status.

Moreover, while the Court in Hoffman was concerned about providing incentives for undocumented workers to remain in the U.S. to mitigate their damages and seek employers willing to ignore the IRCA, employees who suffer work-related injuries in the U.S. are not required to remain in the U.S. to receive benefits. See, Larson's Workers' Compensation Law §66.03§§. Workers' compensation benefits are available to workers who are disabled due to their injury or illness and unable to work. Thus the injured worker has no duty to seek out employment in order to mitigate his or her damages. Therefore, the Supreme Court's primary concern, that backpay under the NLRA would be provided to an individual who could not legally mitigate his or her damages, as required by the NLRA, is not applicable here.

b. POST-HOFFMAN, OTHER STATES HAVE MADE IT CLEAR THAT THEY CONTINUE TO HAVE COMPLETE AUTHORITY TO DEFINE AND ADMINISTER THEIR WORKERS' COMPENSATION SYSTEMS.

Following the Hoffman decision, some states have clarified their position that the U.S. Supreme Court's decision in Hoffman had no effect on the state's interest in making workers' compensation benefits available to all workers, documented and undocumented. For example, the Director of the Washington State Department of Labor and Industries issued a statement that undocumented immigrants continue to be entitled to both time loss and wage replacement after the Hoffman decision:

> The 1972 law that revamped Washington's workers' compensation system is explicit: All workers must have coverage. Both employers and workers contribute to the insurance fund. The Department of Labor and Industries is responsible for ... providing workers with medical care and wage replacement when an injury or an occupation disease prevents them from doing their job. The agency has and will continue to do all that without regard to the worker's immigration status.[37]

Similarly, on September 29, 2002, California passed a bill that amended the Civil, Government, Health and Safety and Labor Codes and made declarations of existing law. The new law reaffirms that "[a]ll protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment who are or who have been employed, in this state."[38]

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[37] Statement dated May 21, 2002 by Gary Moore, Director, *available at* http://www.nelp.org.

[38] *See* CAL. CIV. CODE § 3339 (2002)§§; CAL. GOV'T CODE § 7285, *et seq*§§. (2002); CAL. HEALTH & SAFETY CODE § 24000, *et seq*§§. (2002); CAL. LAB. CODE § 1171.5 (2002).§§

7. THE U.S. SUPREME COURT'S DECISION IN HOFFMAN HAS NO BEARING ON THE COURT OF APPEALS' ANALYSIS IN THIS CASE.

The Court of Appeals agreed with the Magistrate that once the Defendant-Appellee learned of Plaintiff-Appellants undocumented status, that it was no longer under any obligation under the WDCA to pay benefits. The Court based its decision on the fact that it considered the use of fraudulent documents by the Plaintiff-Appellants to be a commission of a crime and because it incorrectly held that its decision was in accord with the policy of the federal government under Hoffman.

The Court of Appeals used the Hoffman decision to hold that the Plaintiff-Appellants use of fraudulent documents constituted a crime thereby making them "unable to obtain or perform work 'because of' the commission of crime. . . ." Sanchez at 672 - 673. However, as explained above, the use of fraudulent documents in obtaining employment does not meet the "commission of a crime" prong of subsection 361(1) and Hoffman does not stand for that proposition. In fact, the only issue in Hoffman was whether a federal agency, the NLRB, has the power to award the remedy of backpay under the NLRA to an undocumented worker. While the Supreme Court concluded that the NLRB's discretion was "limited by federal immigration policy," Hoffman, 535 US at 146, it made no limitation on the discretion of a state agency to interpret state law and to determine entitlement to state benefits, such as workers' compensation.

VIII. RELIEF REQUESTED

For all of the reasons set forth herein, *Amicus Curiae* respectfully requests that this Honorable Court make findings of law that Plaintiff-Appellants status as an undocumented alien is irrelevant to his entitlement to Workers' Compensation benefits, and affirm the decision and order of the Workers' Compensation Appellate Commission on behalf of Plaintiff-Appellant Sanchez and reverse the decision and order of the Workers' Compensation Appellate Commission in Plaintiff-Appellant Vazquez's case. *Amicus Curiae* urges this Court to make any other determinations that it deems equitable and just under the circumstances.

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